No. 06-405

In The Supreme Court of the United States

JAMES RAY,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. Craig Wood
MCGUIREWOODS LLP
Counsel of Record
Court Square Building
310 4th Street, N.E., Suite 300
Post Office Box 1288
Charlottesville, Virginia 22902-1288
(434) 977-2558 (ph)
(434) 980-2274 (fax)

Counsel for Respondent

LANGUAGE LEGAL PRINTING

QUESTIONS PRESENTED

1. Whether the decision of the Fourth Circuit Court of Appeals is in conflict with other circuits regarding whether Respondent is liable under Title VII of the Civil Rights Act of 1964, where no one related to the decision to terminate Petitioner possessed a discriminatory animus, or if a discriminatory animus is assumed, where the final decisionmaker terminated Petitioner based upon an independent and unbiased investigation that included Petitioner's multiple confessions of guilt.

2. Whether the U.S. Court of Appeals for the Fourth Circuit properly applied well-settled standards of review to find that Petitioner had failed to present sufficient evidence for a jury to find that his termination resulted from discrimination based upon Petitioner's race by the Respondent as opposed to Petitioner's multiple admissions that he alone was responsible for the violations of Respondent's policy regarding overtime compensation.

CORPORATE DISCLOSURE STATEMENT

Respondent CSX Transportation, Inc. has the following parent corporation:

CSX Corporation.

The only publicly held company that owns 10% or more of Respondent's stock is:
CSX Corporation.

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STATEMENT OF THE CASE

Respondent, CSX Transportation, Inc., cannot accept the facts submitted by Petitioner James Ray because the petition contains statements and conclusions not supported by the record. Petitioner submits the following as facts material to the consideration of the questions presented:

I. Investigation and Charge

On April 15, 2003, Steve Persinger, trainmaster at Balcony Falls, Virginia depot, had a conversation with his brother, Mike. See Joint Appendix (hereinafter "J.A.") at 324-25. Mike mentioned that one of Mr. Persinger's engineers, William Hardbarger, a white employee, picked up his paycheck at 3:30 the previous afternoon. Id. Mr. Persinger found that odd as time records showed Mr. Hardbarger had worked until 5:30 the previous day and as a result claimed overtime. Id. Based solely on the actions of this white employee, Mr. Persinger began an investigation into whether employees at Balcony Falls were stealing overtime. Id.

As Mr. Persinger was the supervisor who noticed the initial irregularity and informed his supervisors, Mr. Persinger was put in charge of the investigation.[1] Id. At 325-26. Mr. Persinger, in order to conduct an investigation that could withstand union scrutiny, knew that he needed credible evidence to charge any employee with stealing overtime. Id. at 358-59. As a result, Mr. Persinger downloaded employee

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[1] Petitioner refers to the fact Lenford Hatcher, a black trainmaster, was not allowed to conduct the investigation. However, the undisputed facts demonstrate the Respondent has the legitimate policy to assign investigations to supervisors who begin an investigation. J.A. at 423. Thus, Mr. Persinger conducted the investigation and there was no need to include Mr. Hatcher, who was not even working that day.

time records. The time records revealed that some Balcony Falls employees recently had signed out using terminals remote from the actual job sites, called "Blue Zone." Id. at 328, 332-33.

The "Blue Zone" was a computer program designed to allow union officials to monitor their members' work hours for contract administration purposes. Id. at 328. It also had the unintended feature of enabling Respondent's employees to sign off of work from home, as opposed to the location where they were directed by policy to sign off of work. Based on the initial time records, Mr. Persinger was able to determine that Balcony Falls employees, both white and black, were signing out incorrectly. Id. However, Mr. Persinger did not believe he had enough evidence to charge employees with stealing overtime based only on the fact that the Blue Zone program was used. Mr. Persinger knew that any charges would have to withstand union challenge and arbitration scrutiny, and so he set out to determine the exact hours worked by the employees. Id. at 331, 358-59.

To corroborate his suspicions, Mr. Persinger requested the "black box" records from the train operated at Balcony Falls. The "black box" records the exact time an engine starts and stops each day it is in operation. Id. at 328-29. However, the "black box" continuously tapes over itself so that only the most recent times are recoverable. Id. at 329-330. When Mr. Persinger received the records from the "black box," the information was only available from April 11, 2003 through April 16, 2003. Id.

Integrating the time records with the "black box" data, Mr. Persinger concluded he could reliably charge four employees with stealing overtime.[2] Specifically, Mr. Persinger charged Petitioner and three white employees with stealing overtime, charging: (1) Petitioner and Mr.

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[2] Respondent charged both crew members, conductor and engineer, with stealing overtime, regardless of the party responsible for logging off the crew. See J.A. 608-613.

Hardbarger with stealing overtime on April 5, 2003[3], and April 14, 2003; (2) Petitioner and Mr. Woodard with stealing overtime on April 13, 2003; (3) Petitioner and Mr. Hardbarger with stealing overtime on April 11, 2003; and (4) Petitioner and Mr. Mahaffey with stealing overtime on April 16, 2003. Id. at 334-345.

All four employees were charged with the exact same offense. More importantly, no employee was charged where there was no corroborating evidence. For example, the time records showed that on April 12, 2003, Petitioner and Richard Wallace, a black engineer, logged off using the "Blue Zone" but were not charged because no overtime was claimed that day. Id. at 341-42. Further, Petitioner and Mr. Woodward, a white engineer, logged off using the "Blue Zone" on April 8, 2003, and claimed overtime. Id. at 339. However, since there was no corroborating evidence from the "black box," no charges were filed against either employee. Id. Charges were levied against black and white employees where two independent forms of evidence supported the charges, and charges were withheld against both black and white employees where only one indicia of culpability was present. .

II. Boards of Inquiry and Decision-Making Process

As part of the collective bargaining agreement between Respondent and the union that represents Respondent's employees, employees are entitled to a

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[3] Petitioner and Mr. Hardbarger were charged with stealing overtime based on Mr. Hardbarger's unsolicited confession prior to any charges being assessed that the "Blue Zone" had been used improperly on that date to claim unearned overtime, so corroborating evidence from the "black box" was not necessary. The rest of the charges were based on corroboration between the time records and "black box" information.

hearing, called a "Board of Inquiry" ("Board"), with regards to any disciplinary charges against them. See J.A. at 346-47. During these hearings, Respondent's managers present evidence supporting the charges, while each employee is allowed a representative who may cross-examine Respondent's witnesses and present his own evidence that may exonerate him.[4] Id. Three separate Boards were held into the charges against Petitioner and his fellow employees. Id. at 117, 331, 396. Mr. Riddle conducted the Boards, and Petitioner had a union representative at each Board. Id. Petitioner presented no evidence of bias on the part of Mr. Riddle or with regards to the Boards of Inquiry, and asserts none on appeal.

The first Board of Inquiry pertained to the charges against Petitioner and Mr. Hardbarger. At this Board, Petitioner was represented by Mr. Cletus Roy. Id. at 124. When Petitioner was presented the opportunity to present evidence that might exonerate him, Petitioner gave the following testimony: "I apologize to Mr. Hardbarger. I'd like to make a personal apology to him because he had no clue, no idea what went on. It was a bad choice on my part. I didn't use good judgment." Id. at 127. No evidence was given with regards to the charges against Petitioner and Mr. Hardbarger that contradicted Petitioner's confession, and Petitioner did not challenge in any way the evidence presented by Respondent. Id. at 126-28.

At the next Board of Inquiry, Mr. Riddle heard evidence related to the charges against Petitioner and Mr. Mahaffey. During this hearing, Petitioner was represented by his union official, Mr. Hardbarger. Id. at 124-27. When presented with an opportunity to exonerate himself of this charge, Petitioner gave the following testimony: "Mr. Mahaffey had nothing to do with it." Id. at 120. Petitioner confirmed that he alone was responsible for stealing

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[4] At no time during any of the three Boards did Mr. Persinger recommend what discipline, if any, should be imposed on Petitioner or the other three white employees.

overtime on April 16, 2003. Id. at 120-21. Petitioner again did not question or challenge Respondent's evidence.

During the final Board of Inquiry, Mr. Riddle conducted a hearing with regards to the charges against Petitioner and Mr. Woodward. Id. at 121. At this hearing, Petitioner was again represented by Mr. Hardbarger and gave the following testimony: "I'd like to apologize to Mr. Woodward. I've got him involved in this and he didn't have anything to do with it."[5] Id. at 121, 124-27. For the third time, Petitioner did not challenge the evidence against him or request that any additional investigation take place.

Once the Boards were completed, the transcripts of the hearings were relayed to Garhart Williams, Huntington Division Manager. Id. at 397. Before making his final decision, Mr. Williams reviewed the transcripts. Id. Additionally, Mr. Williams asked other high ranking officials of Respondent for their input in order to determine whether his proposed discipline was reasonable. Id. at 397-400. It is important to note that at no time during Mr. Williams' decision-making process did he ever consult with Mr. Persinger.[6] Further, Mr. Williams oversees 2500

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[5] Petitioner argues that the fact Mr. Woodward was not charged with stealing overtime on April 3, 2003, and April 6, 2003 is evidence of the disparate treatment/discipline meted out by the Respondent. See Petition at 5-6. However, the fact is that Petitioner was the conductor working with Mr. Woodward those days and would have been charged as well if Respondent believed it had enough evidence to charge Mr. Woodward. See J.A. at 335-38. It is odd that Petitioner's evidence of discrimination amounts to a belief that the fact he was not charged for two other violations is evidence of discrimination.

[6] Petitioner tries to argue that Mr. Persinger made disciplinary recommendations to Mr. Williams. See Petition at 7, citing J.A. at 237. However, Petitioner is citing the testimony of Mr. Hatcher, who admits he was not present at any of the Boards and had no idea whether any

employees, and did not know Mr. Ray to be black at the time he made his decision. Id. at 391-393. Petitioner never presented any evidence, or made any allegation, that Mr. Williams had a discriminatory animus.

Based on the testimony given at the Boards, Mr. Williams meted out the following discipline: (1) Petitioner was terminated for stealing overtime on four separate occasions; (2) Mr. Woodard, although exonerated by Petitioner, was suspended for 15 days because he did not report the violations; (3) Mr. Hardbarger was suspended for 60 days because he improperly used the "Blue Zone" to receive overtime (only his prior self-reporting saved him from termination); and (4) Mr. Mahaffey was completely exonerated due to Petitioner's confession and the fact Mr. Mahaffey had no idea he received overtime improperly. Id. at 400-01.

Mr. Williams based his decision to terminate Petitioner on Petitioner's repeated confessions. Id. at 400. As Mr. Williams testified at trial: "Well, it's--- I don't mean to downplay its importance but it's open and shut. I mean, if we've got a board that reads like that where the employee steps forth and takes responsibility, I mean, there's not much else to look at." Id. at 401. Further, Mr. Williams made the following statement concerning Petitioner's repeated confessions: "Well, it plays a very large part in it. I mean, you've got one (1) employee standing up and saying that I did it, it's my fault, and either the facts don't contradict it or none of the employees speak up and say so." Id. at 426-27.

After reviewing the Boards of Inquiry and finding that Petitioner's repeated confessions confirmed the results of Mr. Persinger's investigation, Mr. Williams decided to terminate Petitioner. Id. at 400-01. The other employees were given less severe discipline based on Petitioner's

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recommendations were made. See J.A. at 237. Petitioner has no credible evidence that Mr. Persinger ever made disciplinary recommendations.

repeated confessions and his exoneration of the other employees. Id.

As is his right under the collective bargaining agreement, Petitioner appealed his termination to a Public Law Board, established pursuant to the Railway Labor Act. During this hearing, Petitioner stated for the first time that he was terminated for race discrimination. While the Public Law Board did reinstate Petitioner for other reasons, without back pay, the arbitrator found that there was "not a scintilla of credible proof of racial discrimination." Id. at 599.

III. Lower Court Decisions

Despite three attempts by Petitioner to prove intentional discrimination, no independent tribunal that has reviewed this case has found support for Petitioner's argument that he was terminated because of his race. After raising the issue of racial discrimination for the first time at the Public Law Board hearing, the arbitrator found "not a scintilla of credible proof of racial discrimination." J.A. at 599.

Next, the trial court granted Respondent's renewed motion for judgment as a matter of law and set aside the jury verdict because "a reasonable fact-finder could not conclude, on the evidence presented, that in order to rid itself of one particular black employee, CSX charged three white employees, along with plaintiff, knowing somehow that plaintiff would accept full responsibility for the other charged employees." Id. at 591. Specifically, the court found that Petitioner's statements during the Boards of Inquiry made his conduct more serious than others and therefore demonstrated that Petitioner failed to make out a prima facie case of racial discrimination. Id. Additionally, the trial court found that the decisionmaker "was presented with a record of four employees charged with violations and one of them having accepted full responsibility for all of the violations." Id. The trial court found that the decisionmaker,

Mr. Williams, "relied on Petitioner's own statements and took action accordingly." Id.

Finally, in an unpublished per curiam opinion, the Fourth Circuit upheld the trial court's grant of Respondent's renewed motion for judgment as a matter of law. In its opinion, the Fourth Circuit found that Petitioner "presented insufficient evidence that he was discriminated against when CSX brought charges against him," thus demonstrating that Mr. Persinger did not conduct an investigation with a discriminatory animus. See Opinion at 12-13.[7] Further, the Fourth Circuit held that Petitioner's own "confessions" demonstrated that Petitioner was not the victim of intentional discrimination. The Fourth Circuit properly found that "CSX terminated Ray only because of his admissions that evidenced more culpable conduct than other employees who were charged." Id. at 15. In summary, all three independent tribunals found that Petitioner was terminated because of his repeated confessions, and exonerations of the other charged employees, and not as a result of intentional discrimination.

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[7] A copy of the Fourth Circuit's opinion is attached as an appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. Certiorari should not be granted to this case because the Fourth Circuit's opinion on these facts concurs with the law of every other circuit.

Petitioner argues that this case is appropriate to resolve an asserted split between the Fourth Circuit's opinion in Hill v. Lockheed Martin Logistics Management, 354 F.3d 277 (4th Cir. 2004) and the other circuits that follow Shager v. Upjohn, Co., 913 F.2d 398 (7th Cir. 1990). Petitioner posits that the Fourth Circuit should have applied the Seventh Circuit's standard for imputing liability to the employer based on a biased subordinate, see Petition at 15, and that applying Shager would yield a different result.

The facts of this case do not support Petitioner's theory. Petitioner failed to satisfy the threshold requirement of demonstrating racial bias by a supervisor who influenced the decision-making process. All three independent tribunals that have reviewed this matter have found that Petitioner did not present credible evidence demonstrating that Mr. Persinger conducted his investigation with a discriminatory bias. Additionally, any causal link between Mr. Persinger's investigation and the final decision was destroyed by Petitioner's multiple confessions of guilt and exonerations of his fellow employees. Therefore, this case is not appropriate to resolve any "perceived" split as every circuit court in the country would have reached the same result as the Fourth Circuit.

A. Petitioner failed to meet the threshold requirement of every circuit that a plaintiff must show racial bias by a supervisor in order to impute liability to the employer.

There is no circuit split with regards to the first step in the analysis of whether the employer can be held liable for

the alleged bias of a supervisor and/or subordinate. Even Petitioner acknowledges that a plaintiff must first show that a supervisory employee connected to the final decision possessed discriminatory motives. See Petition, citations omitted; see also Hill, 354 F.3d at 291 (holding that an employer can be liable for "an improperly motivated person"). It is axiomatic that liability cannot be imposed on an employer unless the aggrieved employee demonstrates that someone related to the decision-making process was "improperly motivated" by a discriminatory animus.

Petitioner cannot make such a showing in this case. Petitioner argues that Respondent, through Mr. Persinger, conducted an investigation with discriminatory animus, thus tainting the whole decisionmaking process. See Petition at 5, 15. Mr. Persinger began his investigation only after he became suspicious that a white employee was stealing overtime. See J.A. at 324-25. Based solely on these suspicions, Mr. Persinger pulled up time records for all employees at Balcony Falls. Id. at 332-33. Next, Mr. Persinger knew that any charges had to be supported by corroborating evidence because of the inevitable challenges from the union that represented Respondent's employees. Id. at 358-59. Because of this, Mr. Persinger decided that he would only charge employees if he had corroborating evidence.

After Mr. Persinger gathered his information, he applied his decision to charge employees with stealing overtime equally with respect to black and white employees. He charged four employees, three whites and one black, with stealing overtime. Id. at 334-345. Four of the charges were based on the employees' time records and the "black box" data. The fifth charge was based on an employee's confession, corroborating the time records. Id. Where there was no evidence other than the time records, no employee was charged. This decision was applied to all employees

equally, including the Petitioner.[8] Id. Finally, Mr. Persinger charged each employee with the same offense, stealing overtime, and never made any recommendation concerning discipline with regards to Petitioner or the other employees. At no time did Mr. Persinger ever treat Petitioner differently, let alone discriminate against him.[9]

Despite Petitioner's attempt to recast the facts, the undisputed facts demonstrate that Mr. Persinger conducted a neutral investigation with no discriminatory animus. Further, all three independent tribunals that have reviewed this case have agreed with Respondent that Mr. Persinger's investigation was free of any discriminatory animus. See J.A. at 599 (Public Law Board arbitrator found "not a scintilla of credible proof [of] any form of racial discrimination"); J.A. at 590 (Trial court found Mr. Persinger conducted an investigation without suspect motives); Opinion at 13 (Fourth Circuit found that Petitioner "presented insufficient evidence that he was discriminated against when CSX brought charges against him"). Therefore, all circuits would concur with the Fourth Circuit's opinion that there is no credible evidence demonstrating bias

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[8] The Fourth Circuit, therefore, properly found that "there was no disparity of treatment from which one could conclude that [CSX's decision to charge Ray] was a product of racial discrimination." Opinion at 12-13, quoting Cook v. CSX Transp. Co., 988 F.2d 507, 512 (4th Cir. 1993).

[9] Petitioner's argument that a different investigation would have yielded more charges against white employees does not demonstrate pretext. See Wallace v. The Methodist Hosp. Sys., 271 F.3d 212, 225 (5th Cir. 2001) (upholding the district court's grant of a judgment as a matter of law motion where no reasonable jury could have found pretext based on an employer's failure to investigate the plaintiff's general allegations about other potential violations where the plaintiff admitted committing the violations for which she was terminated).

on the part of Mr. Persinger, thus making any "perceived" split irrelevant to the issue in this case.

B. There is no disagreement among the circuits where any causal link between an allegedly biased supervisor and a termination of employment was broken by an independent investigation and repeated confessions of guilt by the minority plaintiff.

Under Shager, any link of the chain of causation is destroyed when the final decisionmaker bases his decision on an independent investigation and/or where an employee confesses to the offense when given an opportunity to exonerate himself. If the final decisionmaker terminates an employee "for reasons untainted by any prejudice" on the part of the supervisor, "the causal link between that prejudice and [the employee's] discharge is severed." Id. at 405.

In affirming the district court's grant of Respondent's motion for judgment as a matter of law, the Fourth Circuit, citing Hill, properly found that Mr. Williams was the final, and relevant, decisionmaker as to Petitioner's termination. See Opinion at 13. Despite Petitioner's attempt to distort the record and ultimate issue in this case, Mr. Williams made the decision to terminate Petitioner only after Petitioner confessed his guilt three times and exonerated the other employees who, coincidentally, were white, during three separate Boards of Inquiry conducted by an unbiased hearing officer at which Petitioner was represented by his union officials. See J.A. at 400-01, 426-27. The Boards of Inquiry and Petitioner's repeated confessions destroyed any causal link between Mr. Persinger's investigation and Mr. Williams's decision to terminate Petitioner.

The Fourth Circuit's decision is supported by courts applying Shager to hold that liability is not imputed to the employer where the final decisionmaker bases the decision on an independent investigation because it breaks the link in the causation analysis. All circuits have found that where the

final decisionmaker bases his decision on an independent investigation, any alleged bias on the part of the supervisor is insufficient to impute liability on the part of the employer. See Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997) (finding the causal link broken where the final decisionmaker conducted his own investigation, including a meeting with the plaintiff, thus making the bias of the subordinate no longer relevant); Long v. Eastfield College, 88 F.3d 300, 307 (5th Cir. 1996) ("If [the final decisionmaker] based his decisions on his own independent investigation, the causal link" is broken); Wilson v. Stroh Companies, Inc., 952 F.2d 942, 946 (6th Cir. 1992) (finding the causal link between the alleged bias on the part of the supervisor and the final decisionmaker broken where the decisionmaker conducted an independent investigation); Collins v. New York City Transit Authority, 305 F.3d 113, 119 (2d Cir. 2002) (finding no causal link between the alleged bias of a supervisor and the arbitration panel that terminated the plaintiff after an evidentiary hearing was held); English v. Colorado Dept. of Corrections, 248 F.3d 1002, 1011 (10th Cir. 2001) ("A plaintiff cannot claim that a firing authority relied uncritically upon a subordinate's prejudiced recommendation where the plaintiff had an opportunity to respond to and rebut the evidence supporting the recommendation."); Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999) ("[T]he causal link between [the supervisor's] animus and her termination is broken by the [final decisionmaker's] hearing and independent decision to actually terminate her."); King v. Rumsfeld, 328 F.3d 145, 153 (4th Cir. 2003) (Finding evidence related to subordinate bias irrelevant when the final decisionmaker conducted his own independent investigation); Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998) (finding the "cat's paw" line of cases inapplicable where the final decisionmaker met with the plaintiff and gave the plaintiff an opportunity to explain); Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 725 (8th Cir. 1998) (failing to impute liability to employer after a hearing where evidence

was heard and no allegedly biased supervisor made any recommendation regarding final discipline); Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003) (dismissing plaintiff's claim where there was no evidence of nexus between final decision and allegedly biased supervisor because the decisionmaker conducted an independent investigation); Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 87 n.4 (1st Cir. 2004) (noting that where an aggrieved employee was given an opportunity to present his side of the story, a non-decisionmaking subordinate's alleged bias would not infect the decisionmaking process).[10]

This is especially true where the aggrieved employee has an opportunity to rebut the charges. See Willis, 118 F.3d at 547, English, 248 F.3d at 1011, Llampallas, 163 F.3d at 1249. Willis is quite instructive as to how courts apply Shager. In Willis, 118 F.3d at 547, an employee was terminated after the final decisionmaker conducted an independent investigation and the employee had an opportunity to explain herself. Id. at 546. The Seventh Circuit found the "cat's paw" analysis inapplicable as the record showed the final decisionmaker based his decision on undisputed evidence of violations and only after the employee was given an opportunity to defend herself. Id. at 547-48.

The facts in Willis are quite analogous to the undisputed facts of this case. Here, after Mr. Persinger conducted the investigation and charged four employees, three of whom were white, with the exact same offense, see J.A. at 334-45, three separate Boards of Inquiry were held where Petitioner was represented by a union official and had a chance to challenge or contradict the charges. Id. at 346-47. Rather than exonerating himself, or contesting the

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[10] See also Foster v. New Castle Area Sch. Dist., 2004 U.S. App. LEXIS 7447 (3d Cir. 2004) (following Hill and holding that discriminatory statements by non-decisionmakers were inadequate to support an inference of discrimination).

evidence demonstrating his guilt, Petitioner confessed three times to the charges against him and completely exonerated the other employees charged with stealing overtime. Id. at 120-21, 124-27. Mr. Williams terminated Petitioner based on an independent and intervening investigation that included three opportunities for Petitioner to tell his side of the story and where he gave three separate confessions, thereby making the "cat's paw" theory inapplicable to this case.

Petitioner miscasts the facts of this case to drum up a circuit court split that, even if it does exist, has no bearing on the outcome of the case. It is undisputed that Mr. Williams was the final decisionmaker and that Petitioner put forth no evidence that Mr. Williams possessed a discriminatory animus. Id. at 397. Instead, Petitioner attempts to argue that Mr. Persinger had the discriminatory animus and that his investigation so tainted the decisionmaking process as to make Mr. Persinger the actual decisionmaker for Title VII purposes.[11] The facts do not support Petitioner's argument.

The facts demonstrate that Mr. Williams was "influenced" by Petitioner's confessions, and not by Mr. Persinger's investigation. "Well, it's--- I don't mean to downplay its importance but it's open and shut. I mean, if we've got a board that reads like that where the employee steps forth and takes responsibility, I mean, there's not much else to look at." Id. at 401. As such, all circuits would agree that Mr. Williams was the "relevant decisionmaker" and that he was not "influenced" by Mr. Persinger's investigation, but rather by Petitioner's repeated confessions and exonerations of the other employees. Therefore, Petitioner has failed to demonstrate that a circuit court split exists and that the other circuits would not concur with the Fourth Circuit's opinion.

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[11] What is interesting to note is that Petitioner's repeated confessions confirmed the findings of Mr. Persinger's investigation that Petitioner stole overtime.

C. The decision below and Hill are in line with other circuits and applies a similar causation analysis.

All circuits, including the Fourth Circuit, find that an employer can be liable when it bases the employment decision on a biased supervisor's actions or recommendations. Petitioner misreads Hill in order to create an illusory conflict. While Hill may differ in its articulation of its approach, it is in line with all other circuits on when it would hold an employer liable for the bias of a supervisor other than the final decisionmaker. Petitioner argues that Hill stands for the proposition that "corporate employers can shield themselves from liability for a supervisor's animus or even institutional discrimination, as long as the company makes sure the ultimate, formal decision is made by an oblivious individual with no apparent discriminatory motivation." Petition at 15. Petitioner mischaracterizes the Fourth Circuit's holding in Hill in order to conjure up a circuit split, and seeks to do so with an unpublished disposition with limited precedential significance. See Rule 36(c) of the Local Rules for the Fourth Circuit

In Hill, the Fourth Circuit correctly placed the burden of proof on the employee to prove that it was the discriminatory animus of a supervisor that was the principal reason for the ultimate employment decision. This is correct because the employee, at all times, has the burden to demonstrate that the employment decision was based on intentional discrimination. See e.g., Jiminez v. Mary Washington Coll., 57 F.3d 369, 377 (4th Cir. 1995). As such, the standard in the Fourth Circuit for imposing liability based on a biased supervisor is:

> "[A]n aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed

> such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer."

Hill, 354 F.3d at 291.

Under the Seventh Circuit Shager standard, "there can be situations in which the forbidden motive of a subordinate employee can be imputed to the employer because, under the circumstances of the case, the employer simply acted as the 'cat's paw' of the subordinate." Willis, 118 F.3d at 547, citing Shager, 913 F.2d at 405. "In such a case, a jury may impute the discriminatory motive of the biased subordinate, as opposed to the motives of the ignorant decisionmaker, to the company." Id.

The Fourth Circuit's standard, while exhibiting grammatical differences from other circuits, applies the same principles of causation that the Seventh Circuit court uses, as well as those employed in the other cases cited by Petitioner. In applying Hill, courts in the Fourth Circuit have applied the causation analysis to determine whether the acts of the subordinate will be imputed to the employer. See Sullivan v. The Cato Corp., 2006 U.S. Dist. LEXIS 14612, *11-12 (D.S.C. 2006); Watkins v. Hospitality Group Mgmt., Inc., 2004 U.S. Dist. LEXIS 4037, *2-4 (M.D.N.C. 2004).[12] These courts have found that the employer may be liable for the acts of the subordinate where it was shown that the subordinate influenced the decision or was "principally responsible" for the decision, even though another person made the final decision. Id.

Further, courts applying Hill require plaintiff to make the same showing as required in other circuits. Compare

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[12] Respondent recognizes the limited precedential value of unpublished opinions. However, Respondent merely cites to these cases to highlight how the Hill standard is applied to demonstrate that there is no split among the circuits.

Murray v. United Food & Commercial Workers Union, Local 400, 2004 U.S. App. LEXIS 11341, *29 (4th Cir. 2004) (requiring plaintiff to present evidence that supervisor harbored racial animus and that the animus can be imputed to the employer) and Lust v. Sealy, Inc., 383 F.3d 580, 584-585 (7th Cir. 2004) (applying Shager, finding liability proper where a biased subordinate's actions may be imputed to his employer). Utilizing Hill, the Fourth Circuit finds an employer liable in the same situations as courts applying the Shager standard.

Under the Seventh Circuit standard, the employer may be liable for the actions of the biased supervisor, even when another makes the formal decision, where the biased supervisor influenced the decision by manipulating the decisionmaking process, see Willis, 118 F.3d at 547, or by concealing relevant information or feeding false information. See Lust, 383 F.3d at 585-86, citing Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997). Applying Hill, the Fourth Circuit also holds that employers will be liable in similar situations. See e.g., Oleyear v. County of Durham, 336 F.Supp.2d 512, 517-18 (M.D.N.C. 2004) (finding that if the final decisionmaker merely rubber stamps the superior's advice, liability will be imposed on the employer based on the supervisor's influence); Campbell v. Town of Southern Pines, 2005 U.S. Dist. LEXIS 38488, *27 n.6 (M.D.N.C. 2005) (imputing liability to the employer's two managers' recommendations for termination where no independent investigation was conducted and one of the managers had made statements threatening retaliation).

Under Hill, the employer will be liable for the adverse employment action if that decision was caused by a biased subordinate. Id. Under Shager, an employer is liable if the biased subordinate caused the adverse employment action. See Lust, 383 F.3d at 584. Both the Fourth and Seventh Circuits apply the same functional causation analysis to determine whether the unlawful bias of a low-level supervisor was the proximate cause of the decision about which the aggrieved employee complains. Therefore,

there is no circuit split on an "important matter" that requires Supreme Court review and Petitioner's writ for petition for certiorari should be denied.

II. Certiorari should not be granted in this case because the Fourth Circuit applied the proper principles of review to sustain the District Court's grant of Respondent's motion for judgment as a matter of law.

Although Petitioner claims the Fourth Circuit should have reached a different conclusion concerning whether there was discriminatory animus, Petitioner is merely asserting error not involving any lack of decisional uniformity. A petition for certiorari should show that a circuit court "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

On this record, Petitioner cannot demonstrate that the Fourth Circuit's opinion deviated from the "accepted and usual course of judicial proceedings." Rather, Petitioner simply disagrees with the Fourth Circuit's analysis and application of the standard of review to the facts of his particular case. Petitioner argues that the Fourth Circuit, and trial court substituted "their own interpretations of the facts" for those of the jury. However, the undisputed, unambiguous facts demonstrate that Petitioner was terminated as a result of his multiple confessions, and not because of intentional discrimination. While Petitioner may not agree with the opinion of the Fourth Circuit, he cannot overcome his hurdle of having to demonstrate that he presented credible evidence of discrimination that could support the jury's verdict, especially after three independent tribunals found not a scintilla of proof supporting Petitioner's allegations.

In affirming the trial court's order, the Fourth Circuit applied the correct standard of review. The Fourth Circuit

found that "if reasonable minds could differ about the result in this case, we must reverse the grant of judgment as a matter of law." Opinion at 11, citing Bryant v. Aiken Reg'l Med. Ctrs., Inc., 333 F.3d 536, 543 (4th Cir. 2003). However, this standard does not mean that jury verdicts are beyond reproach. "A mere scintilla of evidence is insufficient to sustain the verdict, and the inferences a jury draws to establish causation must be reasonably probable." DeJarnette v. Corning, Inc., 133 F.3d 293, 298 (4th Cir. 1998) (internal quotations omitted). Courts "are not a rubber stamp convened merely to endorse the conclusions of a jury, but rather have a duty to reverse the [jury's verdict] if the evidence cannot support it." Price v. City of Charlotte, 93 F.3d 1241, 1250 (4th Cir. 1996).

Here, the Fourth Circuit properly affirmed the trial court's reversal of the jury verdict as the evidence does not support the conclusion that Petitioner was the victim of intentional discrimination.[13] As shown above, Mr. Persinger conducted a neutral investigation without any discriminatory animus. He made decisions on who to charge in a neutral manner, charged each employee with the same violation, and never recommended different discipline for any employee. See supra at Section I(A).

Once Mr. Persinger made his charges, the four employees went before a Board of Inquiry. Id. at 346-47. In each instance, Petitioner confessed to stealing overtime and exonerated the other employees. Id. at 120-21, 124-27. Based on these confessions, Respondent terminated Petitioner and meted out lesser discipline to the other

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[13] It is interesting to note that Petitioner cites the Public Law Board's ruling as proof that Petitioner was not treated the same as the other employees but fails to cite the same Public Law Board's finding that there was "not a scintilla of credible proof of racial discrimination." Where a plaintiff makes such a weak evidentiary showing, granting judgment as a matter of law is proper. See DeJarnette, 133 F.3d at 298.

employees. For the first and only time, and based solely on his confessions, Petitioner was treated differently than the other three employees charged with stealing overtime.

Petitioner's confessions demonstrated that he had engaged in conduct different from that of the three white employees. Thus, the Fourth Circuit properly found Petitioner "was no longer engaged in conduct that 'was comparable in seriousness to misconduct of employees outside the protected class.'" Opinion at 14, quoting Cook, 988 F.2d at 511.

The undisputed, unambiguous facts demonstrate that the Fourth Circuit properly found that "the district court did not err in granting judgment as a matter of law." Opinion at 14. The facts, even when viewed in the light most favorable to Petitioner, demonstrate that Petitioner failed to demonstrate that he was terminated based upon his race. Petitioner failed to satisfy his burden of proof and present evidence, even when viewed in the light most favorable to him, that Mr. Persinger conducted an investigation and charged Petitioner and three white employees with a discriminatory animus. Further, Petitioner failed to present evidence to contradict Mr. Williams' testimony that Petitioner's own confessions, and exonerations of the other employees, were the basis for Mr. Williams' decision to terminate Petitioner. Therefore, as the Fourth Circuit properly affirmed the trial court's ruling, this Court should deny Petitioner's Writ for Petition for Certiorari and affirm the ruling of the Fourth Circuit.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted this 23RD day of October, 2006.

R. Craig Wood
McGuireWoods LLP
Court Square Building
310 4th Street, N.E., Suite 300
P.O. Box 1288
Charlottesville, Virginia 22902-1288
(434) 977-2558 (ph)
(434) 980-2274 (fax)

I, R. Craig Wood, certify that I am a member of the Bar of the Supreme Court of the United States.

R. Craig Wood